IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 601 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ? **1 & 2 YES; 3 to 5 NO**

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KISHANCHAND GULBANI - Applicant(s)
Versus
ROHIT TARACHAND. & 1 - Respondent(s)

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Appearance :
MR BM GUPTA for Applicant(s) : 1,
NOTICE SERVED for Respondent(s) : 1,
MS SM AHUJA for Respondent(s) : 1,
(MR KS JHAVERI) for Respondent(s) : 1,
MR SS PATEL ADDL PUBLIC PROSECUTOR for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 11/01/2007

ORAL JUDGMENT:

1. **P**etitioner, original accused, has approached this court to challenge the order

dated 31.8.1998 of learned Additional Sessions Judge, Ahmedabad by which revision application of original complainant was allowed and Criminal Case No.720 of 1989 was revived with a direction to hold *denovo* trial.

2. Original complainant, opponent No.1 herein, had filed a complaint on 20.3.1989 for the offences punishable under sections 447 and 453 of the Indian Penal Code, 1860 against the present applicant and that complaint, which was registered as Criminal Case No.720 of 1989, was ordered to be dismissed on 12.4.1993 due to absence of the complainant and his advocate. That order was, however, stated not to have been signed. But thereafter, on 26.3.1996, again evidence of the complainant was closed and, upon an application being made by the accused, order dated 22.11.1996 acquitting him under the provisions of sub-section (1) of section 255 of the Code of Criminal Procedure, 1973 (for short, "the Code") was made by learned Metropolitan Magistrate. That order was challenged in revision application by the original complainant and the impugned order came to be passed reversing that order on the basis, *inter alia*, that the order of acquittal could not have been passed under section 255 (1) since the matter was

not decided on merits and the section appeared to have been misquoted.

3. Learned counsel Mr.Gupta, appearing for the applicant herein, submitted that the revision application entertained by the learned Additional Sessions Judge was not maintainable as remedy of appeal was available to the original complainant. Therefore, the impugned order was lacking in jurisdiction, according to his submission. He further submitted that, in view of absence and lack of interest of the original complainant as recorded in the order of trial court, the only course open for the trial court was to acquit the accused either under the provisions of section 255 or section 256 of the Code. He submitted that, even on merits, provisions of section 258 of the Code did not apply in the facts of the case and a serious error had crept in in the impugned order in referring to the provisions of section 258. The learned counsel relied upon the judgment of this Court in ***Yogesh Babulal Shah v. K.S.Bhasin [2005 (3) GLH 553]*** wherein it was clearly held that, as per the settled legal position, the order passed by the learned Chief Judicial Magistrate dismissing the complaint for want of prosecution and non-availability of complainant in a private complaint had an effect

of acquittal. And, revision application cannot be entertained as such application would not lie since the complainant ought to have preferred appeal against the order of acquittal seeking appropriate leave of the court.

4. Learned counsel Ms.S.M.Ahuja vehemently argued that the impugned order of the learned Additional Sessions Judge was proper and legal order in the facts of the case since there was sufficient evidence before the trial court after appreciation of which only an order of conviction or acquittal could have been made. Whereas the trial court had exclusively relied upon the factum of evidence of the complainant being closed there cannot be a clear acquittal and the error being apparent on the face of record resulting into failure of justice, the Sessions Court was right and justified in entertaining and allowing the revision application of the original complainant. She submitted that, since the order under section 255 (1) of the Code could not have been made, the order discharging the accused could have been challenged in revision.

5. However, in view of the aforesaid clear order of the trial court recording acquittal under the provisions of sub-section (1) of

section 255 of the Code, it cannot be gainsaid that the order before the learned Additional Sessions Judge was that of acquittal under the said provision. Whether it was legal and proper was a question which could have been addressed only if the revision application was maintainable. But, since appeal is provided in the Code and revision application is expressly barred where remedy of appeal is available, revision application could not have been entertained. Therefore, it has to be held that the impugned order was illegal and, therefore, required to be set aside. Accordingly, it is set aside and Rule is made absolute with no order as to costs.

Sd/-
(D.H.Waghela, J.)

(KMG Thilake)